BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	

To: The Commission

REPLY TO OPPOSITIONS TO BELLSOUTH'S PETITION FOR RECONSIDERATION AND FORBEARANCE

BellSouth Corporation ("BellSouth"), on behalf of its affiliates and subsidiaries, hereby replies to the oppositions to its Petition for Reconsideration and Forbearance filed by the State of Hawaii ("Hawaii") and the State of Alaska ("Alaska") in the above-captioned proceeding.

I. CONGRESS DID NOT INTEND TO EXTEND RATE INTEGRATION TO CMRS

Both Hawaii and Alaska claim that Congress intended to subject CMRS to rate integration when it adopted Section 254(g).[1] The legislative history proves otherwise. As BellSouth and others demonstrated on reconsideration,[2] Congress merely intended to codify the FCC's existing rate

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[1] Opposition of the State of Hawaii (Oct. 31, 1997); Opposition of the State of Alaska to Petitions for Reconsideration (Oct. 31, 1997). Although replies to the Hawaii Opposition are due today, because the certificate of service indicates that service was effected by mail, the due date for replies to the Alaska Opposition is unclear because the certificate of service does not specify whether it was served on BellSouth by hand or mail. Accordingly, to the extent necessary, BellSouth seeks leave to file a single reply to the two oppositions today, the date for filing replies to oppositions served by mail.

[2] BellSouth Petition for Reconsideration and Forbearance, CC Docket No. 96-61, at 5-6 (Oct. 3, 1997); Bell Atlantic Mobile Inc. Petition for Reconsideration and Petition for Forbearance, CC Docket No. 96-61, at 7 (Oct. 3, 1997); CTIA Petition for Clarification, Further Reconsideration, and Forbearance, CC Docket No. 96-61, at 2-3 (Oct. 3, 1997); PCIA Petition for Reconsideration or Forbearance, CC Docket No. 96-61, at 8-9 (Oct. 3, 1997); PrimeCo Personal Communications, L.P. Petition for Reconsideration, or in the Alternative for Forbearance, CC Docket No. 96-61, at 2-3, 17-21 (Oct. 3, 1997); Telephone and Data Systems, Inc. Petition for Partial Reconsideration, CC Docket

integration policy.[3] The FCC itself acknowledged that "Congressional conferees made clear that Congress intended section 254(g) to incorporate the Commission's existing rate integration policy."[4] The FCC also acknowledged that Congress did not intend Section 254(g) to expand upon the pre-existing FCC rate integration policies. Specifically, the FCC stated that Section 254(g) did not require CMRS rates to be integrated with non-CMRS rates because "Congress intended section 254(g) to codify our pre-existing rate integration policy and we have never required integration of interexchange CMRS rates with other interexchange service rates."[5] By the same reasoning, Congress did not require CMRS rate integration because the FCC had never before required such integration.[6]

II. EXTENSION OF RATE INTEGRATION TO CMRS VIOLATES THE APA

As BellSouth demonstrated in its petition, extension of rate integration to CMRS violates the Administrative Procedure Act's ("APA") notice and comment requirement and lacks a record basis.[7] Hawaii now claims, erroneously, that the APA defects have "been rendered *de facto* moot because the Commission is now considering the CMRS issue directly through its review of the[] petitions

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No. 96-61, at 3-4 (Oct. 3, 1997); AT&T Wireless Services, Inc. Comments in Support of Petitions for Reconsideration, CC Docket No. 96-61, at 2 (Oct. 31, 1997); Comcast Cellular Communications, Inc. Comments, CC Docket No. 96-61, at 2, 3-4 (Oct. 31, 1997); U S WEST, Inc. Comments, CC Docket No. 96-61, at 4 (Oct. 31, 1997).

[3] H.R. Conf. Rep. No. 104-458, at 132 (1996) *reprinted in* 1996 U.S.C.C.A.N. 124, 143-44. As PrimeCo noted, the Senate Report also stated that Section 254(g) "simply incorporates in the 1934 Act the existing practice of geographic rate averaging and rate integration. . . ." PrimeCo Petition at 2 *quoting* S. Rep. No. 104-23, at 30 (1995).

[4] *Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *First Memorandum Opinion and Order on Reconsideration*, FCC 97-269, at ¶ 2, 62 Fed. Reg. 46,447 (Sept. 3, 1997) ("*Reconsideration Order*").

[5] *Reconsideration Order* at ¶ 18.

[6] Hawaii claims that CMRS providers were required to integrate rates prior to enactment of the 1996 Act, but fails to cite any statute, rule, policy, or decision to support this claim. Hawaii Opposition at 4.

[7] BellSouth Petition at 6-15.

for reconsideration."[8] A rule adopted without a corresponding pre-adoption *NPRM* is violative of the APA whether or not the wisdom of the rule is debated after the fact. In *National Tour Brokers Ass'n v. United States*, 591 F.2d 896, 901 (D.C. Cir. 1978), the court made clear that an agency cannot fix notice deficiencies on reconsideration.[9]

Alaska, Hawaii, and the Commission claim that adequate notice was given that rate integration was being extended to CMRS carriers because:

- Section 254(g) clearly requires CMRS to be subject to rate integration and the FCC was merely effectuating Congressional intent;[10]
- the *NPRM* referenced wireless services in a footnote;[11] and
- the *Report and Order* and *Reconsideration Order* both indicated that AMSC, a CMRS provider, was subject to rate integration.[12]

These arguments fail for the following reasons. First, virtually all petitioners demonstrated that Congress intended Section 254(g) to "simply incorporate[] in the 1934 Act the existing practice of geographic rate averaging and rate integration. . . ."[13] This existing practice did not include CMRS.

Second, Bell Atlantic aptly pointed out that in *McElroy Electronics Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993) the court found unpersuasive the Commission's contention that a single ambiguous footnote provides adequate notice of a policy change. By the same token, a single ambiguous footnote referencing wireless services provided inadequate notice that the Commission was proposing to subject the CMRS industry to rate integration.[14] As the *McElroy* court noted:

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8 Hawaii Opposition at 7 n.17.

9 *See* BellSouth Petition at 11.

10 Alaska Opposition at 2-4; Hawaii Opposition at 2-4; *Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Order*, FCC 97-357, at ¶ 19 (Oct. 3, 1997)("*Stay Order*").

11 *Stay Order* at ¶ 19; Hawaii Opposition at 5.

12 *Stay Order* at ¶ 19; Alaska Opposition at 8-9; Hawaii Opposition at 5.

13 PrimeCo Petition at 2 *quoting* S. Rep. No. 104-23, at 30 (1995). *See* note 2 *supra*.

14 Bell Atlantic Petition at 6-7.

> The much heralded footnote thus does not, in the final analysis, serve as the beacon the Commission would have us think, illuminating the petitioners' treacherous path through the text and guiding them safely to the conclusion the Commission now urges.[15]

This analysis is particularly true in this proceeding. Nowhere in the *NPRM* did the Commission refer to CMRS in the context of rate integration.[16] The term "wireless" was used only to refer to a method of interstate transport — and indeed much of the traditional interexchange traffic in the United States has been transported by wireless means: point-to-point microwave and domestic satellite. Thus, a "fair reading"[17] of the term "wireless" in this context would cover such fixed wireless transport facilities but does not indicate that the Commission was expanding the policy to cover wireless "mobile" facilities for the first time. The Commission's existing rate integration policy always applied to the operation of domestic satellite and earth station facilities which are wireless in nature,[18] just as the policy applied to the operation of interstate transport facilities using wire, cable, or fiber.

Third, for the above reasons, the Commission's decision to subject AMSC, a provider of satellite services, to rate integration did not put CMRS providers on notice that rate integration was being extended to the entire CMRS industry.[19] As BellSouth noted in its Petition:

> the fact that AMSC is a provider of satellite service and was specifically subjected to rate integration by name, after considering company-specific arguments regarding the difference between its service and other domestic satellite services, indicates that

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15 990 F.2d at 1362.

16 The Commission only referred to CMRS with regard to its detariffing proposal. *Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Notice of Proposed Rulemaking*, 11 F.C.C.R. 7141, 7157-64 (1996)("*NPRM*").

17 *See McElroy*, 990 F.2d at 1358.

18 *See Domestic Communications Satellite Facilities*, Docket 16495, *Second Report and Order*, 35 FCC 2d 844, 856-57 (1972); *NPRM*, 11 F.C.C.R. at 7180-81. *See also* BellSouth Petition at 6-13; Bell Atlantic Petition at 4-6; PrimeCo Petition at 7; Comcast Comments at 3-4; U S WEST Comments at 3.

19 *Stay Order* at ¶ 19; Alaska Opposition at 8-9; Hawaii Opposition at 5. *See Interstate, Interexchange Marketplace*, CC Docket No. 96-61, *Report and Order*, 11 F.C.C.R. 9564, 9589 (1996).

the Commission did not give any consideration to subjecting CMRS licensees to the rate integration requirement *en masse.*[20]

Simply put, the Commission is obliged to give clear and unambiguous notice of the policies it is proposing in a notice of proposed rulemaking. Here, a "fair reading" of the *NPRM* would not have given any indication that the Commission intended to subject the entire CMRS industry to rate integration. Accordingly, the application of rate integration to CMRS violated the APA. Indeed, no party submitted comments regarding extension of rate integration to CMRS in response to the *NPRM.*[21] Conversely, after the Commission expressly referenced CMRS for the first time in the *Reconsideration Order*, numerous CMRS providers immediately filed petitions urging the Commission to reconsider the issue and noting that there had been no previous notice that extension of the rate integration policy to CMRS had been contemplated.

III. THE COMMISSION SHOULD FORBEAR FROM APPLYING SECTION 254(g) TO CMRS

A number of parties, including BellSouth, maintain that if the FCC determines Congress intended Section 254(g) to extend rate integration to CMRS, new Section 10(a) of the Communications Act requires the Commission to forbear from applying these rate integration requirements to CMRS because (i) enforcement of rate integration requirements is not necessary to ensure that CMRS charges are just and reasonable, (ii) enforcement of Section 254(g) is not necessary for the protection of consumers, and (iii) forbearance is consistent with the public interest.[22] Only Hawaii and Alaska opposed such forbearance.[23]

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20 BellSouth Petition at 13.

21 As BellSouth noted in its petition, "courts have held that the fact that comments fail to deal with the substance of a final rule is an indication that notice was inadequate." BellSouth Petition at 9. *See, e.g., Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1244 (D.C. Cir. 1973).

22 47 U.S.C. § 160. *See* BellSouth Comments in Support of PrimeCo's Motion for Stay, CC Docket No. 96-61, at 7-12 (Sept. 29, 1997); BellSouth Petition at i, 2 n.2; Bell Atlantic Petition at 15-20; CTIA Petition at 8-11; PCIA Petition at 4-7; PrimeCo Petition at 21-25; TDS Petition at 4-5; AT&T Wireless Comments at 5-6; U S WEST Comments at 6-7.

23 Alaska Opposition at 9-14; Hawaii Opposition at 9-17.

According to Hawaii, "petitioners have not demonstrated how forbearance from Section 254(g) would protect consumers or prevent unreasonable discrimination against offshore points of the United States."[24] In response, BellSouth notes that the competitive nature of CMRS is sufficient to protect consumers and prevent unreasonable discrimination. The Commission has indicated that cellular, PCS, and enhanced SMR are or will be substitutable services.[25] In each wireless market in Alaska and Hawaii there could be as many as nine different providers of these services and at least five such providers. As a result, consumers in both Alaska and Hawaii can easily replace any CMRS provider that charges disproportionate rates for interstate, interexchange calls.

Moreover, there is *no evidence* in the record that CMRS providers currently charge or will charge unreasonable or discriminatory rates for interstate, interexchange calls originating in Alaska or Hawaii. Even assuming that such evidence did exist, forbearance still would be warranted because consumers in Alaska and Hawaii can bypass any CMRS long distance charges by "dialing around" the CMRS carrier's long distance supplier. Because consumers have dial-around access, they may access the integrated rates charged by traditional landline long distance suppliers. Thus, consumers always will have access to integrated long distance rates should they prove lower than the equivalent non-integrated CMRS rates.

Even in the absence of dial around access, rate integration is unnecessary. The Commission has never engaged in CMRS rate regulation. Yet in the absence of this regulation, competition has driven cellular service prices down by nearly 64% since 1987.[26] Moreover, Professor Jerry A. Hausman[27] has noted that:

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[24] Hawaii Opposition at 2.

[25] *See Implementation of Sections 3(n) and 332 of the Communications of the Communications Act*, GN Docket No. 93-252, *Third Report and Order*, 9 F.C.C.R. 7988, 8108-10 (1994).

[26] *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 7 Com. Reg. (P&F) 1 (1997); PrimeCo Petition at 23.

[27] Professor Hausman is the MacDonald Professor of Economics at the Massachusetts Institute of Technology, Cambridge, Massachusetts.

> With the passage of the Telecommunications Act of 1996, BOC cellular companies began to provide cellular long distance, since the prohibition of the MFJ no longer applied. While it is too early to determine the competitive outcome of this new competition, the *BOC cellular companies are charging long distance prices for cellular significantly below the price charged by the IXCs.*[28]

Thus, rate integration is not necessary to protect consumers or to ensure that CMRS long distance is provided at just and reasonable rates. The nature of CMRS competition obviates the need for CMRS rate integration.

Forbearance also will further the public interest because it will permit CMRS providers to continue offering wide-area calling plans specifically designed according to communities of interest. Forbearance also will permit pricing flexibility by companies offering different types of CMRS. A company offering cellular and PCS would be permitted to offer different rate packages and calling plans in order to appeal to different market segments. Rate integration will inhibit carriers from offering such plans.

Finally, forbearance will not undermine universal service.[29] As AirTouch Communications demonstrated:

> application of the rate integration rule is unnecessary to protect customers in rural and offshore areas from paying the full burden of higher local exchange costs in those areas. Rate integration was thought to be necessary to maintain long-distance rates low enough to ensure adequate demand for those services, and thus an adequate contribution to universal service. If long-distance rates were high in offshore points, usage would be lower, and per-minute access charges would need to be even higher to meet LEC revenue requirements.
>
> But CMRS carriers do not pay access charges, and therefore have no incentive to charge higher rates in rural and offshore areas where access charges are higher. Consequently, customers in these areas will not pay more for CMRS service absent rate integration. Moreover, subsidy support for local rates in those areas will not be threatened because any increases in CMRS service rates in those areas will simply lead to less demand for that carrier's service, loss of market share for the

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28 BellSouth Phase II Comments (Apr. 25, 1996), Hausman Declaration at 12.

29 *See* Hawaii Opposition at 11.

CMRS carrier, and will have absolutely no effect on LEC revenues or universal service.[30]

IV. TO THE EXTENT CMRS IS SUBJECTED TO RATE INTEGRATION, WIDE-AREA CALLING PLANS SHOULD BE EXEMPT

BellSouth and others have urged the Commission to exempt wide-area CMRS calling plans from any rate integration requirement that may be imposed on the CMRS industry.[31] The Commission itself expressed concern that "application of rate integration requirements to wide area rate plans could be disruptive to consumers" and that subjecting such plans to rate integration may not be warranted by the current record.[32] Even Alaska and Hawaii, the only parties supporting application of rate integration to the CMRS industry, recognized that wide-area CMRS calling plans that permit subscribers to make calls throughout an area for the same price as a local call, even though such calls might otherwise be interstate, interexchange calls, serve the public interest and should not be subject to rate integration.[33]

BellSouth shares the Commission's concern that subjecting wide-area CMRS calling plans to rate integration would be detrimental to consumers.[34] There is no evidence in the record supporting the need to subject such plans to rate integration. In fact, all parties agree that wide-area CMRS calling plans that do not assess per minute or usage sensitive toll charges should not be

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30 AirTouch Petition for Reconsideration, CC Docket No. 96-61, at 10 (Oct. 3, 1997). Notably, although it claimed that forbearance would undermine universal service goals, Hawaii failed to address AirTouch's argument.

31 BellSouth Petition at 17-21; *accord* PCIA Petition at 10; AT&T Comments at 1. *See* AirTouch Petition at 17; PrimeCo Petition at 13-14; CTIA Petition at 3-5.

32 *Stay Order* at ¶ 15.

33 Alaska Opposition at 15 ("Interstate CMRS calls for which there is not a toll charge may not properly be subject to rate integration requirements because they are not considered interexchange calls"); Hawaii Opposition at 19 ("The State favors wide-area calling plans that offer distance-insensitive charges because they promote the public policy. . . .").

34 *See* BellSouth Petition at 17-21.

subject to rate integration.[35] Accordingly, should the CMRS industry be subjected to rate integration, the Commission should expressly exempt wide-area calling plans from this requirement.

V. CMRS PROVIDERS SHOULD NOT BE REQUIRED TO INTEGRATE RATES ACROSS AFFILIATES

The Commission should reconsider its decision to require CMRS "affiliates" under common ownership and "control," as defined by 47 C.F.R. § 32.9000, to rate integrate. BellSouth and the other petitioners demonstrated that such a requirement would have a "daisy-chain" effect that would result in competitors charging the same rates for interstate, interexchange CMRS.[36] The CMRS industry is characterized by joint ownership of systems by multiple companies who compete elsewhere. Thus, the requirement that CMRS providers rate integrate across affiliates will force partners to agree on rates charged throughout their systems. As a result, competitor after competitor will charge identical, non-competitive rates for interstate, interexchange CMRS. Even Alaska and Hawaii, the only two parties advocating for extension of rate integration to CMRS, concede that requiring rate integration across affiliates is problematic.[37] Accordingly, the Commission should not require rate integration across affiliates.

Although Hawaii and Alaska concede that the Commission's rule is unworkable as currently written, they do not appreciate the scope of the problem. For example, both Alaska and Hawaii oppose BellSouth's request that CMRS providers should not be required to integrate rates across cellular and PCS affiliates.[38] Requiring cross-service rate integration will disadvantage consumers,

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35 Customers opting for wide-area calling plans usually pay a flat monthly fee for the plan. This fee is not usage sensitive and does not apply solely to interstate, interexchange calls. Accordingly, this fee does not constitute a separate "toll" charge that would require the plan to be subject to rate integration.

36 BellSouth Petition at 21-23; Bell Atlantic Petition at 14-15; CTIA Petition at 6; PCIA Petition at 8-9; PrimeCo Petition at 15-17; PrimeCo Motion for Stay of Enforcement, CC Docket No. 96-61, at 8 (Sept. 23, 1997).

37 Alaska Opposition at 14; Hawaii Opposition at 23-24.

38 Alaska Opposition at 14-15; Hawaii Opposition at 6 n.14.

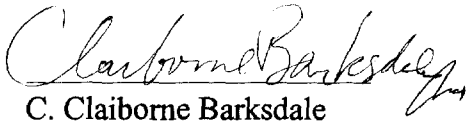
however, where such PCS and cellular systems are commonly owned even though in different markets. PCS providers often adopt new pricing approaches to attract customers and differentiate themselves from the incumbent cellular operators. If rate integration is required across cellular and PCS affiliates, a PCS carrier would be forced to charge the same rate as its sister cellular carriers. The PCS carrier's ability to differentiate itself from incumbent cellular carriers would be diminished and customers may lose the innovative pricing packages generally associated with new PCS entrants.

CONCLUSION

For the foregoing reasons and for the reasons set forth in BellSouth's underlying petition, the Commission should either exempt CMRS providers from rate integration or forbear from applying Section 254(g) to the CMRS industry.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

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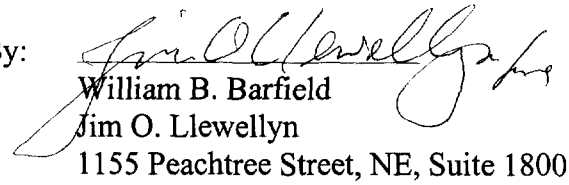
By: 

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I, Crystal Clay, hereby certify that on this 14th day of November 1997, copies of the foregoing Reply in CC Docket No. 96-61 were served on the following by mail:

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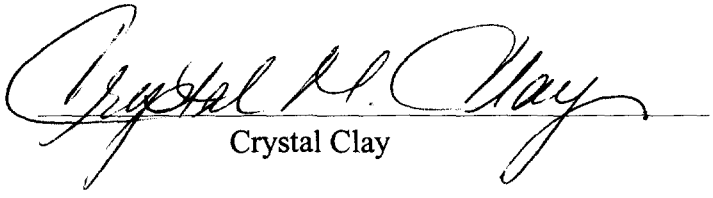

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